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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1179

LOUIS LEIGHTON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1967

No.

LOUIS LEIGHTON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Louis Leighton, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on December 15, 1967.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit has not been officially reported F. 2d . Its opinion is annexed hereto as the appendix. The aforementioned judgment affirmed the judgment of conviction had in the United States District Court for the Southern District of New York dated the 22nd day of May, 1967, which, after a verdict of a jury, adjudged the petitioner guilty of violating § 201, Title 18, of the United

States Code (bribery of a public official). The petitioner was sentenced to a term of six months imprisonment for the aforementioned violation and fined the sum of $2,000. which amount has been paid into the "Escrow Account" of the Clerk of the District Court. No opinion was rendered by the District Court.

A petition for rehearing was made to the United States Court of Appeals for the Second Circuit. The petition was filed timely on December 28, 1967. The petition for rehearing requested, among others that the said Court of Appeals rehear the matter en banc. This application was denied on January 8, 1968. On January 8, 1968, the Court of Appeals for the Second Circuit entered an order staying issuance of its mandate, pending determination of petitioner's application in this Court for a Writ of Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Statutes Involved

The pertinent portions of the statute involved read as follows:

> "§ 201. *Bribery of public officials and witnesses*
>
> (a) For the purpose of this section:
>
> 'public official' means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any

official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

* * * * *

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or

indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or"

Constitutional Amendments Involved

This case involves questions concerning the IV, V and VI Amendments of the Constitution of the United States.

The pertinent portions of such amendments read as follows:

"AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY: SELF-INCRIMINATION; DUE PROCESS: JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law; * * *.

"AMENDMENT VI—JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Rules Involved

Rule 12.

Pleadings and Motions before Trial; Defenses and Objections

(a) *Pleadings and Motions.* Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere.* All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

* * * * * *

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Questions Presented

1. Was it not prejudicial error for the trial court to violate petitioner's constitutional rights guaranteed him under the Sixth Amendment of the Constitution of the United States to assistance of counsel in a criminal proceeding when the court, at the request of the United States attorney, directed the appellant not to discuss anything with his attorney or anyone else during a recess of 85 minutes

occurring immediately after appellant completed his direct testimony and prior to his being cross-examined?

(a) Is not the constitutional right to counsel and the assistance of counsel at all stages of a trial such a right that its violation constitutes real error and requires no showing of prejudice to the defendant?

(b) Would it not be in violation of appellant's rights to refuse to be a witness against himself guaranteed him by the Fifth Amendment of the Constitution of the United States to require appellant to establish at the trial level or appellate level that he was, in fact, prejudiced and harmed by the trial court's refusal to permit him to consult with counsel during the aforementioned luncheon recess?

(c) If the answer to either (a) or (b) supra is in the negative, did the Government sustain its burden of establishing beyond a reasonable doubt that appellant's right to counsel and to the effective assistance of counsel was not impaired by the trial court's ruling?

(d) Is not the requirement that a petitioner's attorney demonstrate to the trial judge that the aforementioned denial of counsel prejudiced the petitioner in effect a requirement for a breaching of the attorney-client privilege?

2. In the instant case, under a two count indictment,[1] charging that the petitioner and a co-defendant, Harold M. Miller, who was acquitted by the trial jury, violated §§201 (b) and 2 of Title 18, United States Code, in that they paid a bribe in the sum of $200.00 to a public official of the United States, one Thomas J. Tiffany, an officer and employee of the Internal Revenue Service, United States Treasury Department, with intent to influence Tiffany's official acts, to

[1] Indictment is set forth at pp. 640 to 641 of Record.

wit, a field audit examination of the 1962, 1963 and 1964 joint income tax returns of appellant and his wife, Nellie, and that petitioner and his co-defendant violated §§201(f) and 2 of Title 18, United States Code, in that they gave a gratuity in the sum of $200.00 to the aforementioned public official, was it not prejudicial error to admit evidence in the form of recorded evidence obtained by an electronic device of conversations and statements allegedly made and had by and between petitioner and the aforementioned public official Thomas J. Tiffany, the conversations and statements being made in petitioner's place of business in the County of Bronx, City and State and Southern District of New York, the said agent Tiffany having entered the premises for the alleged purpose of auditing the aforementioned tax returns of the petitioner herein and carrying concealed within his briefcase an electronic recording device known as a "minifon" plus a miniature radio transmitter thus causing the conversations had with appellant and others and the statements made by appellant to be recorded and to be broadcast and received by inspectors of the Internal Revenue Service (R. pp. 32, 41)[2]? Should not the trial court have excluded the recording upon the minifon as having been obtained in violation of petitioner's constitutional rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States and should not this evidence also be ruled inadmissible by reason of the inherent powers of this court to formulate rules of evidence for federal criminal trials guided by the considerations of justice? Objection to the admission of the said evidence was duly taken[3].

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[2] References to the testimony and record are preceded by the letter "R".

[3] R. pp. 266-281.

3. Petitioner having interposed a defense of entrapment should not the District Court have granted—

(a) Petitioner's preliminary motion for a hearing de hors the trial on the question of whether or not petitioner could establish entrapment as a matter of law pursuant to Rule 12 of the Rules of Criminal Procedure?

(b) Petitioner's motions for a directed judgment of acquittal?

(c) Did not the verdict of acquittal of petitioner's co-defendant Miller by the trial jury demonstrate that the jury rejected the theory and testimony of the Government's case and establish as a matter of law that the crime for which petitioner stands convicted came into being solely because of the acts of the Government in entrapping petitioner into making the offer of a bribe or gratuity?

Reasons for Allowing Writ

The issues presented by the first question propounded supra have never been passed upon directly by this Honorable Court. This is the first known case presenting to this Honorable Court the question of whether or not a defendant is deprived of his rights under the Sixth Amendment of the Constitution to have the assistance of counsel in a criminal trial when the Court, during a recess, directs the defendant not to confer or talk with *anyone.*

The decision of the Court of Appeals for the Second Circuit in the instant case creates a conflict between the Second Circuit and the Third Circuit[4].

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[4] *U. S.* v. *Venuto*, 182 F. 2d 519, 3rd Circuit, (1950).

This Honorable Court has repeatedly held that certiorari should be granted in matters of import where a conflict exists between the various circuits of the Court of Appeals of the United States[5].

Not only is there a conflict between the United States Court of Appeals for two different circuits but there is also a conflict between the appellate courts of the various states[6].

This Court having ruled in *Gideon* v. *Wainwright,* 372 U. S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792, that the provisions of the Sixth Amendment that an accused shall enjoy the right to have the assistance of counsel applies equally to an accused in a state court as well as an accused in the fed-

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[5] A view of the recent cases in which certiorari was granted for the above reason are *Rogers* v. *Quan* (1958) 357 U. S. 193, 194, 2 L. ed. 2d 1252, 1253; *Corey* v. *United States* (1963) 375 U. S. 169, 171-172, 11 L. ed. 2d 229, 231-232, 84 S. Ct. 298; *Downum* v. *United States* (1963) 372 U. S. 734, 735, 10 L. ed. 2d 100, 102, 83 S. Ct. 1033; *Knetsch* v. *United States* (1960) 364 U. S. 361, 362, 5 L. ed. 2d 128, 130, 81 S. Ct. 132.

[6] The state appellate courts rule the same as the Court of Appeals for the 3rd Circuit in *U. S.* v. *Venuto, supra,* in the State of Penna.; *Commonwealth* v. *Vivian* (1967) 426 Pa. 192, 231 A. 2d 301; *Commonwealth* v. *Peetros* (1965) 206 Pa. Super. 503, 214 A. 2d 279; *Commonwealth* v. *Werner* (1965) 206 Pa. Super. 498, 214 A. 2d 276; The same is true in the State of Mississippi; *Pendergraft* v. *State* (1966) Miss., 191 So. 2d 830, *Tate* v. *State,* Miss., 192 So. 2d 923 (12/12/66). In Massachusetts and in Washington, D. C., they have extended the rule to the right to counsel at all stages to include Civil trials; *Zambarano* v. *Massachusetts Turnpike Authority,* 215 N.E. 2d 652 (1966); *Thompson* v. *Atlantic Building Corp.,* Mun. Ct. App. D.C. 107 A. 2d 784 (1954); Illinois decided favorably to petitioner's contention in *Peo.* v. *Martin,* 84 Ill. App. 2d 117, 228 N.E. 2d 557 (1967); The rule in the State of Michigan is more drastic than that pronounced below in the instant case: *Peo.* v. *Prevost,* 219 Mich. 233, 189 N.W. 92 (1922); California is more in line with the decision in the instant case: *Peo.* v. *Bennett,* 79 Cal. App. 766, 249 P. 20 (1926); *Peo.* v. *Love,* 53 Cal. 2d 843, 350 P. 2d 705 (1960).

eral court establishes the import to the courts of the various states of the United States that a definitive ruling be pronounced by this Court on the first question presented herein.

In respect to the second question, namely, the right of a Government Agent to carry concealed on his person or among his effects an electronic recording apparatus used when he is in conversation with prospective defendants. There is no doubt that this Honorable Court ruled it permissible in *Lopez* v. *U. S.*, 373 U. S. 427 (1963). However, confusion has arisen among the Bench and Bar by reason of this Court's pronouncement in *Osborn* v. *U. S.*, 385 U. S. 323 (1966), that the use of the secreted recording device was permissible because it had been approved by two judges of the District Court prior to its actual employment. It is the general impression that the ruling in the *Lopez* case, *supra,* has been weakened further by the expressions of this Court in *Berger* v. *U. S.*, 388 U. S. 41 (1967) where this Court struck down as unconstitutional statutes of the State of New York[7] permitting interception of telephone conversations and eavesdropping by electronic devices upon order and approval of a judge. In the *Berger* case this Honorable Court held that both the statute in question and the order based upon it were so broad as to deny any security of privacy in matters other than of a criminal nature.

The confusion and uncertainty of the intent of this Honorable Court has increased with its recent decision in *Katz* v. *U. S.*, 19 L. ed. 2d 576 (1967). While it is true that Mr. Justice White in his concurring opinion took pains in the

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[7] Code of Criminal Procedure of the State of New York, Sec. 813-a.

footnote thereto to state that the decision in the *Katz* case did not disturb the previous ruling of this Court in *Lopez* v. *U. S., supra,* the language contained within the opinion of the court delivered by Mr. Justice Stewart appears to do violence to that statement.

The third question presented by this appeal is one of tremendous import to a defendant asserting an entrapment defense. In the instant case the petitioner had moved prior to trial for a hearing pursuant to Rule 12 of the Rules of Criminal Procedure on the issue of entrapment. It was and is the contention of petitioner that the provisions of Rule 12 for a hearing separate and apart from the trial were applicable where the defense was one of entrapment and that upon it being developed at such a hearing that the defendant was, in fact, entrapped as a matter of law, the court of necessity would have to dismiss the indictment summarily. This Honorable Court has never directly ruled upon this issue. In the case of *Sherman* v. *U. S.*, 356 U. S. 369, 2 L. ed 2d 848, 78 S.Ct. 819, the prevailing opinion of this Court delivered by Mr. Chief Justice Warren stated that this Court would not rule on whether or not the issue of entrapment should be decided as a matter of law by the judge and not the jury, in view of the fact that this issue had not been presented in the courts below at either the trial or appellate level.[8]

Mr. Justice Frankfurter in his opinion concurred in by Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan urged that the issue of entrapment should be passed upon by a judge as a matter of law and quotes with approval from the concurring opinion of Mr. Justice Roberts in *Sorrells* v. *U. S.*, 287 U. S. 435 at 457.

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[8] 356 U.S. 376-7, 2 L. ed. 2d 848, 853-4.

In the case of *Masciale* v. *U. S.*, 356 U. S. 386, 2 L. ed. 2d 859, 78 S.Ct. 827, decided by this Court on the same date as *Sherman* v. *U. S., supra,* Mr. Justice Frankfurter dissented in an opinion[9] concurred in by Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan and urged that the case be remanded to the District Court for determination of the issue of entrapment as a matter of law by the trial judge. In the instant case petitioner asserted his position in his pretrial motion, in his request for a directed judgment of acquittal upon the trial, and in his appeal in the Court of Appeals for the Second Circuit.

Statement of Facts

The petitioner was tried under an indictment charging him and Harold M. Miller, in the First Count, with bribing an Internal Revenue Agent on or about December 27, 1965 by paying him $200.00, and, in the Second Count, referring to the same event, with giving what might be described as an unlawful fee or gratuity to the said Thomas J. Tiffany.

The testimony of Tiffany revealed that he had been assigned to make a field audit of the income tax return of petitioner and his wife, Nellie Leighton, for the years 1962-1964 (R. 16). Petitioner was engaged in a retail fruit and produce business and a wholesale fruit brokerage business, his place of business being in the Bronx. He was in partnership with George Brandes and it was necessary to make an audit of this partnership return, as well as that of the individual return of the petitioner.

Tiffany testified that on the first occasion he had spoken with petitioner and co-defendant, Harold M. Miller, an ac-

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[9] 356 U.S. 386 at 389, 2 L. ed. 2d 859 at 861.

countant, and that Miller had made to him what he interpreted as a suggestion that a bribe or gratuity might be forthcoming if he acted favorably toward petitioner in performing the audit. Petitioner was not present during this alleged conversation. That because of this the agent reported the incident to the Inspection Service of the Internal Revenue Service[10] (R. 22-27, 29).

When he returned on December 27, 1965 he was armed with a brief case in which there was concealed a miniphone wire recorder. He went to the premises in question at 1177 Stratford Avenue in the Bronx, with several other employees of the I.R.S., these men being attached to the Inspection Service. He met petitioner immediately adjacent to the place used as an office by Brandes and Leighton. They entered this office and after a short while petitioner asked if he might talk to Tiffany "off-the-record" to which question Tiffany replied in the affirmative (R. 31-35).

Leighton then went on in his conversation with Tiffany, mentioning the spirit of Christmas, that he, Leighton, would like to do something for Tiffany, buy him a suit of clothes, and eventually, during the course of the conversation, under prodding by Tiffany Leighton said that he would give Tiffany $200. if he would speed up and close out the audit. He testified that Leighton said he did not believe there was anything wrong with the returns, though there may be a discrepancy or oversight here or there. All of this conversation allegedly took place prior to the arrival of Miller, and at sometime after Miller arrived petitioner in apparent jesting manner said to the agent or rather asked the agent if he were bugged or carried a recorder and touched him lightly on the shoulders (R. 35-37).

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[10] Hereinafter referred to as I.R.S.

During the course of the trial the Court received in evidence, over the objection of the attorneys for petitioner and the co-defendant, the wire recording allegedly made by Tiffany while in the business office of petitioner. This was physically played to the jury and it appears at page 294 of the Record, that each juror was furnished with earphones so that he might listen to the recording. The court reporter, however, made no effort to record in his notes the wire recording.

The Government called several Inspectors[11] attached to the Regional Inspector's Office of the I.R.S. on December 27, 1965. They testified to the furnishing of the recorder, etc. to Agent Tiffany, to their transporting him to the Bronx and to the fact that his person had been searched prior to his leaving their presence on the morning of the 27th and at that time he had approximately $21.00 on him and when he returned he had $221.00.

Cross-examination of Inspector Smyth developed that by pre-arrangement a panel truck had been parked near the place of business of appellant and that Smyth, Sharkey, Carros and one, Cerino, the driver, secreted themselves within the truck.

The co-defendant Miller testified in his own behalf. He denied making any suggestions to Agent Tiffany or having any conversation with him that might have indicated the willingness of either Miller or petitioner to pay any bribe or gratuity to Tiffany. His testimony appears at pages 316 through 397 of the Record. In addition Miller described in

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[11] Carros' testimony appears at pp. 234-286 of the Record—Sharkeys' at pp. 286-28 of the Record—Smyth's at pp. 219-234 of the Record.

general outline the business conducted by Brandes and Leighton.

Miller testified that the audit was subsequently completed by another agent of the I.R.S. After Leighton's arrest this auditing developed certain technical differences. One concerned itself with the proper allocation of a long-term capital gain from the sale of an interest in real estate and the other problem developed was that Leighton had continued his stepmother as a dependent deduction, not realizing that she had started to receive social security. In all, the difference for the 3 years, including interest and penalties, amounted to approximately $570. (R. 322-324).

Petitioner, testified in his own defense. In furnishing his background, he testified that he was 55 years of age, married with 2 grown children and 3 grandchildren. That his name originally had been Lipschitz and he had had it changed by Court Order in December, 1942 to Leighton (R. 398-401).

Petitioner completed Grammar School and had one-half year of High School and had gone to work driving a truck for wholesalers in the produce business. He started peddling fruit from a pushcart and eventually he at the age of 20, and George Brandes became associated in 1932 and opened a retail fruit and vegetable stand at Stratford Avenue in the Bronx where they still conducted a retail business. He described the nature of the business (R. 401-407).

He described his first meeting with Agent Tiffany as occurring on December 8, 1965, at which time they were alone. While in the offices used by petitioner's firm, Tiffany remarked upon the clothes worn by petitioner and the fact that they were very nice looking and appeared expensive.

Petitioner stated Tiffany said, "I wish I could afford one". That they had a general conversation in which Tiffany remarked about how poorly paid bank tellers and government employees such as himself were yet they were responsible for important sums of money. Tiffany remarked that underpaying people of this type caused them to embezzle or do wrong things (R. 407-415).

On December 27th Agent Tiffany returned to the premises of petitioner. Again, he and petitioner were alone. Leighton testified that he had gained the impression that Tiffany's remarks of December 8th were hints from Tiffany to Leighton that Tiffany desired an offer of a gratuity from Leighton. Not being certain of this and not wanting to offend Tiffany, by offering or suffer consequences by failing to offer, Leighton asked Tiffany, "May I ask you something off-the-record" (R. 423).[12]

Leighton also testified that he informed Agent Tiffany that he believed his records were in good shape and that there was nothing wrong in the Returns.

Leighton's direct testimony was concluded just before the luncheon recess (R. 428). The U. S. Attorney requested the trial judge to instruct the petitioner not to talk with anyone, including counsel. Instructing his client not to speak with him because of the ruling of the Court, the attorney for petitioner took exception to the ruling and advised the Court that he was objecting and excepting to the ruling upon the same grounds urged by counsel for co-defendant,

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[12] Tiffany's testimony in respect to this is as follows:

"He started by—after we had talked about the weather, something like that, said he wanted to ask me something off-the-record and was it all right with me for him to do this and I said, yes" (R. 35).

Miller, at the time a similar ruling had been made by the Court.[13]

Counsel for petitioner attempted to elicit whether or not he had consented to Agent Tiffany or anyone else recording the conversation between petitioner and Tiffany and also whether or not he had consented to Tiffany entering his business premises armed with a Fargo transmitter and a miniphone concealed upon or about his person. Objections to this line of questioning was sustained by the Court (R. 426-427).

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[13] "The Court: What do you want to say? I am making a ruling. I am asking Mr. Miller during the recess he please not discuss the testimony with the lawyer.

Mr. Kasanof: If your Honor please, I want the record to specifically show that your Honor is directing him not to speak to me during the recess.

The Court: Not until he finishes his testimony.

Mr. Kasanof: I specifically object on the ground it deprives the defendant of assistance of counsel.

The Court: I am not depriving him of assistance of counsel at all.

Mr. Kasanof: So the record may be complete, your Honor, I take the position that if the defendant may not at any time during any recess, including when he is on the stand, or in the middle of cross-examination—and that is the fact here—that if he is forbidden to confer with counsel that such a prohibition deprives him of the assistance of counsel.

The Court: All right.

(Recess.)"

POINT I

The trial court's ruling denying petitioner the right to consult with counsel during the luncheon recess was in violation of petitioner's constitutional right to the assistance of counsel guaranteed under the Sixth Amendment.

The Court of Appeals admits, in its opinion, that the petitioner should not have been barred from communicating with counsel during the recess but in effect held this to be harmless error concluding that *Chapman* v. *California,* 386 U. S. 18 applied in the instant case.[14]

They held that the instant case should be distinguished from *United States* v. *Venuto, supra,* because here eighty-five minutes was involved and in *Venuto* there was "a series of rulings". In *Tate* v. *State, supra,* the Supreme Court of Mississippi concluded that the barring of communication between a defendant and his lawyer during a fifteen minute recess declared at the conclusion of the defendant's direct testimony was a violation of the defendant's Sixth Amendment rights and required a reversal of a conviction. In *Commonwealth* v. *Vivian, supra,* the Supreme Court of Pennsylvania ruled that the defendant's right to assistance of counsel as guaranteed by the Sixth Amendment was violated when on the fourth day of a trial while the defendant was under examination as a witness the trial judge remanded him to the custody of a court officer during the recess period and instructed counsel not to confer.

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[14] They said, "We conclude that the Government has established beyond a reasonable doubt that the appellant's right to the effective assistance of counsel was not impaired by the ruling of the trial court. See *Chapman* v. *California,* 386 U.S. 18, 87 S.Ct. 824 (1967)."

Although the Court of Appeals ruled that the Government had established "beyond a reasonable doubt" that petitioner's right to the assistance of counsel had not been affected by the trial court's ruling both the Record on Appeal and the Government's Brief in the Court of Appeals are barren and silent on this question.

To hold that petitioner's attorney or petitioner had of necessity to establish and represent to the trial court that petitioner desired and required the right to consult with counsel would, in effect, require petitioner and his attorney to speak and thus violate petitioner's rights under the Fifth Amendment. While it is true petitioner had chosen to testify, it is equally true that he had the right under the Fifth Amendment to remain mute, except as to those matters elicited through his direct and cross examination while acting as a witness in his own behalf.

To require petitioner or his attorney to explain in detail why it was desirable that they confer in effect creates an impossible barrier for petitioner to hurdle.

Anyone who has ever acted as a trial counsel or who has ever sat as a trial judge knows that perhaps the most crucial period of necessity for conference between an accused and his attorney is at the conclusion of the direct examination of the accused. Frequently a defendant desires to call to the attention of his counsel his failure to develop upon direct examination some matter or matters that had been discussed pre-trial. Just as frequently, the attorney for an accused desires to call to his client's attention the fact that in responding to questions put to him on direct examination he had been too verbose and to caution the defendant to be more sparing in his response to cross exam-

ination, or many times the reverse is true and the defendant has failed to answer fully on direct examination with the result that his attorney desires to advise him that his testimony would be more effective if he give full response on cross-examination.

Upon the argument of the appeal in the instant case in the Court of Appeals Judge Smith, who wrote the opinion below, asked the United States Attorney how a trial attorney could possibly make any representation to the trial court of the necessity of speaking with his client during the recess until he had in fact spoken with him. Of course, there was no response to this inquiry.

In relying upon *Chapman* v. *California,* the Court of Appeals ignored the fact that the constitutional question presented here was not one concerning the admission of evidence or the comments of a prosecutor that might or might not effect the deliberations of a trial jury. As was pointed out by Mr. Justice Stewart in his concurring opinion in *Chapman* v. *California, supra,* the right to assistance to counsel is too fundamental that this constitutional error might be considered harmless.[15]

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15 "When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' *Glasser* v. *United States,* 315 U.S. 60, 76, 86 L. ed. 680, 702, 62 S.Ct. 457. That, indeed, was the whole point of *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. ed. 2d 799, 83 S.Ct. 792, 93 ALR2d 733, overruling *Betts* v. *Brady,* 316 U.S. 455, 86 L. ed. 1595, 62 S. Ct. 1252. Even before trial, when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' *Hamilton* v. *Alabama,* 368 U.S. 52, 55, 7 L. ed. 2d 114, 117, 82 S.Ct. 157; *White* v. *Maryland,* 373 U.S. 59, 60, 10 L. ed. 2d 193, 194, 83 S.Ct. 1050." (386 U.S. 18, 43, 17 L. ed. 2d 705, 721).

In this Honorable Court's recent decision in *Bitter* v. *United States* (Oct. 16, 1967) 19 L. ed. 2d 15, a judgment of conviction was reversed where the commitment of the defendant during the trial to a jail approximately forty miles from the site of the trial was held to constitute "an unwarranted burden of defendant and his counsel in the conduct of the case."

POINT II

The admission into evidence of the wire recording of the conversation between petitioner and agent Tiffany was real error where there was no order permitting same.

In *Lopez* v. *United States,* 373 U.S. 427, 10 L. ed. 2d 462, 83 S. Ct. 1381, this Honorable Court by a divided court held it was proper to admit into evidence at a trial a recording surreptitiously made by an internal revenue agent in conversation with a taxpayer defendant. In that case, as in the instant case, the defendant was charged with giving a bribe or gratuity to a Government employee. In writing the opinion for this Court, Mr. Justice Harlan rejected the argument that the recording should have been excluded in the exercise of the court's supervisory powers holding that there was "no manifestly improper conduct by federal officials". Petitioner submits that this is exactly what distinguishes the instant case from *Lopez.*

In *Lopez* there was wrong doing on the part of the defendant in the giving of a bribe to the internal revenue agent prior to the agent ever making use of a recording device. This circumstance does not exist herein. In fact, in the instant case, it is obvious that the agent returned with

the recorder in the hope of entrapping petitioner or his co-defendant into making an improper offer as is evidenced by the fact that both the testimony of Agent Tiffany and of petitioner and the recording itself show that petitioner, prior to making the offer of the bribe or gratuity, inquired if he might speak with the agent "off the record" and that it was only after Agent Tiffany replied in the affirmative that petitioner made the improper offer.

It is respectfully submitted that there cannot be an example of "manifestly improper conduct by federal officials" that would be more obvious than the foregoing. It was, is and should forever be the duty and obligation of any government official to discourage any possible offer of a bribe or gratuity. The government employee and official in this case, Agent Tiffany, was in a position to foreclose any conversations concerning anything improper between petitioner and himself, by merely saying: 'no.' ".[16]

That this Court has recognized the fact that there may be grave questions as to the soundness of its ruling in *Lopez* v. *United States, supra,* is evidenced by its decision in the case of *Osborn* v. *United States,* 385 U.S. 323, 17 L. ed. 2d 394, 87 S. Ct. 429 (1966), there, Mr. Justice Stewart in writing for the court remarked in note 7 at p. 329, 17 L. ed. 2d at p. 399:

> "The indiscriminate use of such devices in law enforcement raises grave constitutional questions under the 4th and 5th Amendments; and that these considerations impose a heavier responsibility on this

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[16] Petitioner during cross examination testified:

"Q. Why did you ask him, 'Can I ask you something off the record'? A. Because if he would have said it to me, 'No', I would have stopped." (R. 460)

court in its supervision in the fairness of procedures in the federal court systems."

In the *Osborn* case, two (2) District Court Judges, acting jointly, authorized the installation of the device in question on the person involved. This was done by the judges only after an affidavit had been submitted to them setting out in detail previous conversations had by that person with Osborn.

In the recent decision of this Court on a similar issue, *Berger* v. *New York,* 18 L. ed. 2d 1040, the court ruled that a New York Statute permitting eavesdropping and interception of telephone conversations was unconstitutional because of the fact that the statute was too broad and sweeping.

As recently as December 18, 1967 this Court, in the case of *Katz* v. *United States,* 19 L. ed. 2d 576, re-affirmed its rule in *Osborn* v. *United States, supra,* that under sufficiently "precise and discriminative circumstances a federal court may empower Government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the * * * allegations' of a 'detailed factual affidavit alleging the commission of a specific criminal offense' ".[17]

In the instant case the Government could not have obtained an order for the recording of any conversation had by Agent Tiffany with the petitioner. Concerning the first meeting had on December 8th, 1965 between Tiffany, petitioner and the co-defendant Miller, Tiffany's testimony was to the effect that the only one he considered to have made any improper suggestion or hint of a possible bribe

[17] 19 L. ed. 2d 584.

was the co-defendant Miller. Any affidavit submitted by the Government in support of an order for Tiffany to use a secreted electronic recording device would, of necessity, have resulted in the obtaining of an order limiting the use of such device in connection with the co-defendant Miller solely and could not have been the base for any order relating to the petitioner.

Professor R. Kent Greenawalt of Columbia Law School delivered an address March 18, 1967 at the law school's Post Graduate Conference on wiretapping and bugging. After the decision in *Berger* v. *New York, supra,* he published the aforementioned address with revisions in "Case & Comment", Vol. 72, No. 5. Among other things, he said at p. 6—

> "Under existing constitutional decisions, one party to a discussion may surreptitiously record it or transmit it to law enforcement officers even if the conversation takes place on the premises of the party against whom the evidence is used; but the most recent cases cast doubt upon the durability of this rule —at least in its present broad form."

In his footnote 10, he cited *Osborn* v. *United States, supra,* and the treatment of that case in *Berger* v. *New York, supra.*

Again at p. 12 of his article in footnote 19, referring to permissive wiretapping or electronic bugging with the consent of any party to the conversation, Professor Greenawalt said:

> "Except for the summary description of existing law, I have not considered the problem of overhearing with the consent of one party, or recording or transmittal by one party without the consent of the other. My own view is that these should be pro-

> hibited when no law enforcement interest is involved, and that even in the law enforcement context, such use of electronic devices should be circumscribed by a requirement of probable cause and a court order system."

The dangers of permitting the indiscriminate use of recording devices such as those used by Agent Tiffany in the instant case—the miniphone and the Fargo transmitter—is evidenced by the recording itself. A good portion of the recording is taken up with personal conversation between the petitioner and his co-defendant at a time when apparently Agent Tiffany was actually doing his work in auditing the books and records of the petitioner's partnership, Brandes and Leighton. Fortunately for the petitioner and his co-defendant, nothing which might be deemed improper was said by either of them at the time, and yet there was a definite invasion of their privacy.

In passing, it is interesting to note that in both *Lopez* v. *United States* (*supra*) and in the instant case not only was the agent supplied with a miniphone but, also, he was supplied with a "Fargo transmitter" and, likewise, in both instances, it apparently is the claim of the Government that the transmitter failed to work.[18] Whether or not the transmitter in fact failed to work, or whether or not it conveniently failed to work because it showed more or other than the wire recording, is a matter for conjecture. Regardless of that, it is evident that the I.R.S. was prepared to violate the rights of the appellant, both by the use of the miniphone and the use of the Fargo transmitter.

It is respectfully submitted that the use of the miniphone recording was in violation of petitioner's constitutional

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[18] 373 U.S. 427, 430, 10 L. Ed. 2d 462, 465.

rights under the 4th Amendment of the Constitution and constituted an unreasonable search and seizure of his conversations and an invasion of his right to privacy.

That the Court should have excluded the recording in the exercise of its supervisory powers, *McNabb* v. *United States,* 318 U.S. 332, 87 L. Ed. 819, 63 S. Ct. 608 (1943), becomes obvious when one considers the setting of the playing of the recording to the jury. The recording was not played merely by means of a loud speaker system set up in the courtroom but each individual juror was furnished with headphones so that each might individually listen to the wire recording. This act of permitting the jury to participate in the "cops and robbers" activity of the I.R.S. and the Government was calculated to and must have prejudiced the jury against petitioner.

The government attorney played the recording a second time as part of his summation.

It is further urged that permitting the use of the recording was calculated to and did compel the petitioner to testify in his own behalf. The psychological significance the jury must have given to having heard the recording was such that any defendant would feel compelled to take the stand to explain how the conversation in question came into existence.

It is respectfully submitted that this was used by the Government for this purpose and it was successful in violating the petitioner's rights under the 5th Amendment of the Constitution.

The failure of the Government to obtain judicial sanction for the use of the recording device in this case was fatal.

POINT III

The Court below should have determined as a matter of law that petitioner had established that he was entrapped by a Government agent and the Court should have dismissed the indictment or directed a judgment of acquittal.

A. Petitioner's motion for a separate hearing prior to trial, to establish entrapment as a matter of law should have been granted and the indictment dismissed.

B. Petitioner's motion for a judgment of acquittal should have been granted.

In the *Lopez* case, *supra,* this Honorable Court held that the defendant's belated claim of entrapment was insubstantial and that the record failed to disclose any prejudice that would warrant disturbance of the judgment.

In the instant case petitioner, immediately after indictment, made an omnibus motion and among the relief requested was that the court order a hearing pursuant to Rule 12 of the Federal Rules of Criminal Procedure to determine the issue as a matter of law of the petitioner's claim and defense of entrapment by an agent of the United States Government (R. 650) 265 F. Supp. 27, 36.

The issue of entrapment here differs from that usually presented to the court in that in most instances the party claiming entrapment is engaged in a business or a course of conduct that is in and of itself in violation of the law. Here, there could have been no violation of the law except for the acts of the Government's agents.

The return of Agent Tiffany to the place of business of petitioner was primarily to entrap petitioner into making

an offer of a gratuity or bribe and secondarily to audit the books and records of petitioner's partnership business. This is obvious when one considers that Agent Tiffany went armed with both a miniphone and a "Fargo transmitter". By no stretch of the imagination could either of these instruments assist Agent Tiffany in auditing the books and records of the taxpayer.

The jury by its verdict of acquittal of the co-defendant, Miller, rejected the testimony of Agent Tiffany to the effect that Miller had first, on December 8th, propositioned the agent as to the possibility of him receiving something material in return for closing out the audit. The theory of the Government as outlined in the opening of the United States Attorney and in his summation was that the co-defendant, Miller, was to "soften up" the Internal Revenue Agent, and feel him out as to whether or not he was responsive to receiving a bribe or gratuity. Miller denied categorically that he had played any such role. The jury found that Miller had not done so.

Leighton's testimony as to his conversation on December 8th with Agent Tiffany, in which Tiffany had noted the quality of Leighton's clothing and expressed his thoughts concerning the underpayment of bank employees, Internal Revenue Agents conducting audits and other persons in positions of trust, led Leighton to believe that Tiffany was seeking a gratuity, is not only plausible but is substantiated and corroborated by Tiffany's own testimony that Leighton had, after asking Tiffany if he could speak to him "off-the-record", mentioned to Tiffany that he would give him a "suit of clothes" and that it was only after Tiffany kept pushing him that Leighton finally agreed to give to Tiffany $200.

Bribery or the giving of a gratuity to a government employee is not such a crime that anyone might be expected to have a predisposition to commit.

The bribe or gratuity in the instant case was conceived in the womb of the government's agents and nurtured at the breast of the government. The failure of its employee, Tiffany, to advise petitioner that he, Tiffany, could *not* be spoken to "off-the-record" establishes beyond peradventure of any doubt that the government's aim and desire was to have the petitioner offer a gratuity or bribe to its employee, Tiffany.

In *Lopez* v. *United States, supra,* after referring to the leading cases on entrapment,[19] this court, in its opinion, written by Mr. Justice Harlan, held that, disregarding the niceties of the many issues that have been mooted in respect to a question of whether or not entrapment is involved, the basic principle of the defense of entrapment is that the government agents have, in fact, manufactured the crime in question. He said that mere strategems in the detection and prevention of crime were permissible.[20]

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[19] *Sorrels* v. *United States*, 287 U.S. 435, 77 L. Ed. 413, 53 S. Ct. 210, 86 ALR 249; *Sherman* v. *United States*, 356 U.S. 369, 2 L. Ed. 2d 848, 78 S. Ct. 819; *Masciale* v. *United States*, 356 U.S. 386, 2 L. Ed. 859, 78 S. Ct. 827.

[20] "The conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible stratagems involved in the detection and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged." 373 U.S. 427, 434-5, 10 L. Ed. 2d, 462, 468.

It is respectfully urged that in the instant case the crime charged to petitioner was, in fact, conceived and manufactured by the government agents and was not a "stratagem" to detect or prevent crime.

Mr. Justice Frankfurter in his concurring opinion in *Sherman* v. *United States, supra,* in which he was joined by Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan said that courts refuse to convict entrapped defendants because the methods employed by the Government are wrong and quoted Mr. Justice Holmes in his dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438, 470, 72 L. ed. 944, 952, 48 S.Ct. 564, in which he stated "that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is obtained.[21]

He also quoted with approval from that portion of the opinion of Mr. Justice Roberts appearing at p. 457 of 287 U.S. in the case of *Sorrells* v. *United States, supra,* and concluded his opinion with the following:

> "Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, cannot give significant guidance for official conduct for the future. Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands." [22]

The basic unfairness of requiring a defendant to establish his defense of entrapment before a trial jury becomes

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[21] 356 U.S. 369, 380, 2 L. ed. 2d 848, 855.

[22] 356 U.S. 369, 385, 2 L. ed. 2d 848, 858.

apparent when one considers that a defense of entrapment might be likened to the old common law form of pleading in Civil cases of "confession and avoidance". Usually, in attempting to establish entrapment the defendant admits the violation of law charged but says in effect "I would not have done it except for the method and tactics of the Government's agents". The prejudice that must flow therefrom in the minds of the trial jury is so great as to be practically insurmountable.

Though it is not true in the instant case since there was no claim of predisposition, in most instances where a valid defense of entrapment exists a defendant, previously convicted for a similar crime, is most reluctant to assert before a trial jury his defense of entrapment fearing that the harm created by the rule that the Government may establish predisposition outweighs with the trial jury any benefit that might flow from the defense of entrapment. Fairness to a defendant entrapped or believing he was entrapped requires disposition of this defense by pre-trial hearing and decision by a judge on the matter of law involved.

If a defendant was required to move to suppress illegally seized evidence only within the confines of his trial before the trial jury, it is doubtful if such motion would ever be made.

This Court has held that where there is a claim that a confession was not given voluntarily this issue must be tried before a judge who must first rule, as a matter of law, on the question of voluntariness and, if he decides against defendant, he must still submit the issue to a trial jury.* [23]

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[23] *Jackson* v. *Denno*, 378 U.S. 368, 12 L. ed. 2d 908, 84 S.Ct. 1774 (1964).

Surely petitioner and anyone else asserting a defense of entrapment is entitled to no less at the hands of the court.

CONCLUSION

It is respectfully submitted that the questions submitted indicate serious errors concerning novel questions and conflict of opinions among the United States Courts of Appeal of various circuits and Appellate Courts of various states and warrant the exercise of this Court's supervisory jurisdiction by issuance of a writ of certiorari.

Respectfully submitted,

GILBERT S. ROSENTHAL,
Attorney for Petitioner

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172—September Term, 1967.

(Argued November 14, 1967 Decided December 15, 1967.)

Docket No. 31476

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS LEIGHTON,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of conviction on verdict of guilty of bribery of an Internal Revenue Agent in violation of 18 U. S. C. § 201(b), entered in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge.* Affirmed.

GILBERT S. ROSENTHAL, New York, N. Y., *for appellant.*

ELKAN ABRAMOWITZ, Asst. U. S. Attorney, So. District of New York (Robert M. Morgenthau, U. S. Attorney, and Michael S. Fawer, Asst. U. S. Attorney, on the brief), *for appellee.*

SMITH, *Circuit Judge*:

Appellant Louis Leighton was convicted on trial to the jury in the Southern District of New York, Dudley B. Bonsal, *Judge*, of bribing an Internal Revenue Agent in violation of 18 U. S. C. §201(b), and he appeals. We find no error and affirm the judgment.

The alleged bribe was made during the second of two meetings with Feld Agent Tiffany at Leighton's place of business. Both parties agree that a bribery suggestion was made at the first meeting of the agent and the taxpayer. The litigants, of course, hotly dispute the authorship of the bribery suggestion. Tiffany appeared at the second meeting armed with both a concealed miniature wire recorder and a concealed miniature radio transmitter. The transmitter failed to function well, but the recorder produced a reproduction of a portion of the conversation between Leighton and Tiffany which was later admitted into evidence at the trial. Leighton now relies on three rulings of the trial court as bases for reversal of his conviction: (1) that Leighton was ordered not to consult with his attorney during a luncheon recess which occurred in the interim between the direct and cross examination of Leighton; (2) that the minifon recording of the conversation between Leighton and Tiffany was admissible; and (3) that entrapment was not established as a matter of law. Since Leighton made timely objections to these rulings they are properly before us on appeal.

Leighton's objection to the ruling of the trial court that he could not consult with his attorney during the luncheon recess is framed in terms of the violation of his right to

counsel. But Leighton was represented by retained counsel during the entire trial. What is actually at issue is the question of the effective assistance of counsel. At no time during, before, or after the recess, did either Leighton or his attorney indicate that they did in fact have something to discuss which might have affected Leighton's testimony or course of action. Leighton's attorney did object to the judge's ruling, but the objection appears to us an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss. Compare *United States* v. *Krull*, 240 F. 2d 122 (5 Cir.), cert. denied 353 U. S. 915 (1957). We conclude that the government has established beyond a reasonable doubt that the appellant's right to the effective assistance of counsel was not impaired by the ruling of the trial court. See *Chapman* v. *California*, 386 U. S. 18, 87 S. Ct. 824 (1967).

Leighton's reliance upon *United States* v. *Venuto*, 182 F. 2d 519 (3 Cir. 1950), is misplaced. That case involved a series of rulings barring communication between a defendant and his attorney in a four-day bank deposit reconstruction income tax trial involving voluminous records. The harm done by the ruling in those circumstances is self-evident. In the case before us, only one eighty-five minute luncheon recess is involved. The ruling in the instant case barring communication between the defendant and his counsel during the recess between direct and cross examination was also applied to every other witness who testified at the trial. The application of this ruling to others than the defendant is not in issue. Its application to the defendant was quite plainly uncalled for, and we are un-

able to understand why it was sought or made as to him. We will not, however, reverse the conviction solely on this ground when we can discern no actual harm to the right to effective assistance of counsel, and are convinced that there was none.

Leighton also objected to the admission into evidence of the wire recording made by Agent Tiffany of their conversation. A sound recording made by or with the permission of a government agent who is a party to the recorded conversation is admissible. *Lopez* v. *United States,* 373 U. S. 427 (1963). The Supreme Court has twice during the last year reaffirmed the position that it had previously enunciated in *Lopez, Osborn,* v. *United States,* 385 U. S. 323, 87 S. Ct. 429 (1966); *Berger* v. *New York,* 388 U .S. 41, 87 S. Ct. 1873, 1880 (1967), even though some commentators appear to have doubts as to the soundness of the rule. See discussion on the basis of the *Lopez* rule in Westin, Privacy and Freedom (1967) 356-359.

Lastly, Leighton contends that the district judge erred when he refused to enter a judgment of acquittal since Lieghton had established the defense of entrapment as a matter of law. The entrapment defense hinged on which of two conflicting versions of the first conversation between Leighton and Agent Tiffany was to be believed. The entrapment defense rested upon a question of credibility, properly put to the jury. *Osborn* v. *United States,* 385 U.S. 323, 331, 87 S. Ct. 429, 434 (1966). Since Leighton does not even allege any errors in the charge to the jury, no grounds for reversal in connection with the question of entrapment are shown.

The judgment of conviction is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

LOUIS LEIGHTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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LOUIS LEIGHTON, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 33-36) is reported at 386 F.2d 822.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1967. A petition for rehearing was denied on January 8, 1968. On January 30, 1968, Mr. Justice Harlan extended the time for filing a peti-

tion for a writ of certiorari to March 6, 1968, and the petition was filed on February 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly found that, in the circumstances of this case, petitioner was not prejudiced when the trial judge instructed him that he should not discuss his testimony with defense counsel during a luncheon recess.

2. Whether a recording of petitioner's conversation with an Internal Revenue agent was properly admitted into evidence.

3. Whether the evidence established entrapment as a matter of law.

4. Whether the court was required to determine the issue of entrapment at a hearing before trial.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York of paying $200 to Thomas Tiffany, an employee of the Internal Revenue Service, with intent to influence his official acts, in violation of 18 U.S.C. 201(b).[1] He was sentenced to imprisonment for six months and fined $2,000.

1. In November 1965, Thomas Tiffany, a revenue agent assigned to examine petitioner's tax returns,

[1] The jury acquitted Harold Miller who was jointly charged with petitioner.

made an appointment to see him (Tr. 16-17). On December 8, 1965, while Tiffany was examining some records at petitioner's place of business, petitioner's accountant, co-defendant Harold Miller, said he would like to "wrap it up" and asked Tiffany if he owned a home. When Tiffany answered that he did not, Miller replied that he had asked that question because he was employed by a nursery firm. Miller also told the agent that some "fringe benefits" would be put on his job (Tr. 18-23, 26, 172-173). A short time later, petitioner entered the room and left some currency on the desk where Tiffany was working. Later petitioner returned, took the money, counted it and made out what appeared to be a deposit slip (Tr. 28-29). Upon leaving, Tiffany gave Miller a list of additional items that he wanted to see in order to continue with the audit (Tr. 27). When Tiffany returned to his office he communicated with the Inspection Office of the Internal Revenue Service (Tr. 29-30).

On December 21, 1965, after being outfitted with recording devices, Tiffany returned to petitioner's place of business (Tr. 31-32, 55, 57). Petitioner inquired whether he could ask Tiffany something "off the record". When Tiffany replied affirmatively, petitioner said that in the spirit of Christmas he would like to give the agent a suit of clothes or a couple of hundred dollars. Tiffany indicated that this would be all right with him. Petitioner then said that there was nothing materially wrong with the returns filed except perhaps some oversight. Later, after Miller arrived, petitioner said that he hoped the agent was not bugged (Tr. 34-37). Two hours later, as Tiffany

was leaving the premises, petitioner put two hundred dollars in the agent's raincoat pocket (Tr. 38-40).

Testifying in his own defense, petitioner claimed that on December 8, 1965, Tiffany had stated that he wished he could afford clothes as expensive as petitioner's, and had remarked that bank tellers were encouraged to embezzle money by being poorly paid, that he himself was poorly paid, and that the government was taking in money but he was not profiting thereby (Tr. 411-414). Concluding that these remarks were an overture for money, petitioner considered it necessary to offer Tiffany something at his next visit (Tr. 422, 424-425). Petitioner also explained that he had placed the currency on the desk where Tiffany was working in order to prepare a bank deposit (Tr. 416-419).

2. Following the direct testimony of agent Tiffany, the first government trial witness, the court recessed for lunch. At petitioner's request, the court instructed Tiffany not to discuss his testimony with anyone (Tr. 49). Again, at the conclusion of the day, this time at the request of counsel for the co-defendant, the court again instructed Tiffany not to discuss his testimony during the overnight recess (Tr. 153). On the third day of trial, co-defendant Miller testified in his own defense. In a recess taken during his cross-examination, the court instructed Miller not to discuss his testimony with his attorney[2] (Tr. 374-375). Later that

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[2] At that time, the following occurred:

THE COURT: What do you want to say? I am making a ruling. I am asking Mr. Miller during the recess he please not discuss the testimony with the lawyer.

MR. KASANOF: If your Honor please, I want the

morning, petitioner took the stand in his own behalf, concluding his direct examination at the noon recess (Tr. 427-428). The following then ensued (Tr. 429):

> MR. OBERMAIER [The Prosecutor]: May the witness be instructed as before your Honor?
>
> THE COURT: Yes.
>
> MR. ROSENTHAL [Petitioner's Attorney]: Dont' talk to me about the case.
>
> And may I have an exception, your Honor, the same as Mr. Kasanof [Miller's Attorney] had with respect to this instruction?

After the recess, petitioner completed his testimony and offered no other witnesses (Tr. 434 *ff*).

On appeal the court of appeals found that the ruling barring communication between petitioner and his counsel during recess was "quite plainly uncalled for," but that, under the standard of *Chapman* v. *California*, 386 U.S. 18, reversal of the conviction was not warranted.

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record to specifically show that your Honor is directing him not to speak to me during the recess.

THE COURT: Not until he finishes his testimony.

MR. KASANOF: I specifically object on the ground it deprives the defendant of assistance of counsel.

THE COURT: I am not depriving him of assistance of counsel at all.

MR. KASANOF: So the record may be complete, your Honor, I take the position that if the defendant may not at any time during any recess, including when he is on the stand, or in the middle of cross-examination—and that is the fact here—that if he is forbidden to confer with counsel that such a prohibition deprives him of the assistance of counsel.

THE COURT: All right.

ARGUMENT

1. The record here amply supports the determination of the court of appeals that the ruling barring communication between petitioner and his counsel during the luncheon recess was not reversible error. Since the declaration of the recess between the direct and cross-examination was itself not a matter of right but rested in the sound discretion of the court, it is difficult to see how petitioner was prejudiced by the trial court's ruling.

Here, petitioner had initiated the procedure of directing a witness not to talk to anyone during a recess by seeking such a ruling while Agent Tiffany was testifying. Having succeeded in imposing this restriction on the single government witness to the bribe, petitioner's counsel was under a duty to indicate to the court how a similar restriction imposed during petitioner's testimony would impair his right to the effective assistance of counsel.[3] However, when the prosecutor requested that the "witness be instructed as before", defense counsel immediately responded by instructing his client not to talk to him about the case. As the court of appeals pointed out, the objection to this ruling appeared to be "an attempt to sow reversible error into the record, rather than an effort to indicate to the trial judge that the attorney and client had something to discuss" (Pet. App. 35).

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[3] Had there been any meaningful basis for such a claim, it could have been presented easily at the time the restriction was imposed.

The circumstances here are thus significantly different from *United States* v. *Venuto*, 182 F.2d 519 (C.A. 3), upon which petitioner relies. In that case the court, singling out the defendant from all other witnesses, instructed him not to consult with counsel during an eighteen-hour overnight recess under a threat that he would revoke defendant's bail and commit him to jail incommunicado if he were to consult counsel. Moreover, that case was a complicated income tax case involving numerous records where consultation during the case may well have been necessary for effective assistance of counsel. Here the disputed factual issues were simple and the need to consult with counsel during the recess was not apparent.[4] Thus, the court below properly concluded that, in the circumstances of this case, there was "no actual harm to the right to the effective assistance of counsel" (Pet. App. 36).

2. The admissibility of the recording of the conversation on December 27, 1965, made by a Minifon carried in Tiffany's person, is controlled by *Lopez* v. *United States*, 373 U.S. 427.[5] The fact that prior to the use of the Minifon in *Lopez* there was an unequivocal bribe offer, while here the conduct and statements of petitioner and his accountant merely

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[4] *Bitter* v. *United States*, 389 U.S. 15, is not in point. The order incarcerating the defendant for being tardy constituted a punishment without any hearing and was, therefore, deemed unjustified.

[5] At the trial, the court sustained a defense objection to the introduction of a written transcription of the recording (Tr. 271-272).

suggested a bribe, furnishes no valid ground of distinction. Nor do recent decisions of this Court undermine the holding in *Lopez*. See the government's brief in opposition in *Long* v. *United States*, No. 1001, certiorari denied March 4, 1968.

3. There is no merit to the contention that the evidence established entrapment as a matter of law. The government's evidence showed that at the first visit petitioner placed money on the table where Tiffany was working and that Miller talked of giving the agent some "fringe benefits". This refutes the claim that the crime originated with the government agent. The fact that at the beginning of the second visit the agent did not stop petitioner when he requested an "off the record" conversation can hardly be said to have induced the crime. Nor does the acquittal of Miller compel the conclusion that the jury rejected Tiffany's version of the conversations at the first visit. Aside from the fact that the jury can return inconsistent verdicts, the jury may have found that Miller was not sufficiently involved to warrant his conviction as an aider and abettor.

4. Equally unsound is the contention that petitioner was entitled to a separate hearing before the court on the issue of entrapment. This Court has held that the defense of entrapment is a question for the jury in determining guilt or innocence. *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369. There is nothing in this case which warrants a re-examination of the rule. Indeed, the disputed factual issue—who initiated the bribe—was particularly appropriate for determination by a jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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